

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17MD2804
Cleveland, Ohio

June 25, 2019
1:03 p.m.

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TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE DAN A. POLSTER,
UNITED STATES DISTRICT JUDGE, AND
DAVID A. RUIZ, UNITED STATES MAGISTRATE JUDGE.

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26 ALSO PRESENT:

27 Special Master David Cohen
28 Special Master Francis McGovern
29 Special Master Cathy Yanni

30 Proceedings recorded by mechanical stenography;
31 transcript produced by computer-aided transcription.
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1 the plaintiffs' side.

2 MR. LANIER: Thank you. May it please the
3 Court, Your Honor.

4 Our desire is to follow assiduously your
13:05:21 5 directions, and so we are here to roadmap and give you
6 information on three points. We are not here to argue
7 substance or try to poison the well, if it were, on any
8 of these.

9 THE COURT: I don't think you'd poison it,
13:05:39 10 but I appreciate that, that the purpose is not for
11 argument.

12 MR. LANIER: Yes.

13 THE COURT: If I need that, I'll get it way
14 down the road.

13:05:45 15 MR. LANIER: With that admonition in mind,
16 Your Honor, the first item that I want to inform the
17 Court about is we have pleaded fraud.

18 Fraud, we believe the activities of fraud
19 that we would try to prove are activities that are
13:06:02 20 subsumed within other actions, including RICO and the
21 Ohio statutory RICO equivalent. And so we will be
22 dropping the fraud claims.

23 That will remove one of the summary
24 judgments of the defendants, and it's something that I'm
13:06:18 25 delighted to be able to tell the Court is the beginning

1 of us continuing to trim down what we've got.

2 With that announcement, Your Honor, that
3 leaves us with two other things on the agenda that you've
4 given us. One is roadmapping the summary judgments, and
13:06:33 5 the other is the *Daubert* motions.

6 On the summary judgment motions, Your
7 Honor, we anticipate filing three. We would prioritize
8 them in the following manner.

9 The first in priority is a partial
13:06:50 10 adjudication of duties under the Controlled Substances
11 Act. This is basically our motion to counter the
12 argument of "I'm just a truck driver," that a number of
13 the distributors especially seem to make.

14 We anticipate filing that because we
13:07:09 15 believe that it will help direct not only settlement
16 issues, but it will help direct the trial itself and
17 streamline the trial if we all have a common
18 understanding of the duties under the Controlled
19 Substances Act that are relevant for our case.

13:07:25 20 The second motion that we anticipate filing
21 on summary judgment is a partial summary judgment
22 abatement of public nuisance that will have two aspects
23 to it.

24 The first aspect is the finding of an
13:07:42 25 ongoing nuisance. The second aspect -- and the nuisance,

1 of course, being a significant interference with public
2 health. The second being the joint and several liability
3 to abate for any defendant who is a substantial
4 contributor.

13:08:00 5 We do not believe that the apportionment
6 statute will be applicable under those equitable claims
7 to abate, and we believe that when the Court rules on
8 this summary judgment, it will strike a number of the
9 affirmative defenses and streamline the trial as well.

13:08:16 10 Our third motion for summary judgment is
11 actually related in part to the first motion for summary
12 judgment that I described to you, but in priority terms
13 we put it third because we think that it would be the
14 third one that we believe should be looked at, and that
13:08:35 15 is if the Court rules on our partial adjudication of
16 duties under the Controlled Substances Act motion, which
17 we hope the Court will, then we will also be seeking a
18 factual or an undisputed factual summary judgment of each
19 of the defendant violations.

13:08:54 20 And if the Court will rule on these, each
21 defendant that we're able to deal with on that basis will
22 take a chunk out of the trial.

23 Those are the only three motions for
24 summary judgment we anticipate filing, Your Honor.

13:09:07 25 On the *Daubert* motions, which is the third

1 thing to cover with you here, we will not be filing any
2 *Daubert* motions.

3 We believe that the motions that we would
4 file in front of you all concern matters that will be
13:09:24 5 best dealt with through cross-examination of the various
6 experts, so you will not get *Daubert* motions from the
7 plaintiffs' side.

8 That concludes our roadmap, Your Honor.

9 THE COURT: Thank you, Mr. Lanier.

13:09:37 10 That's very succinct.

11 Let me just -- so are you saying if -- you
12 believe there's undisputed evidence that various
13 defendants violated their duties under the Controlled
14 Substances Act?

13:10:07 15 Is that -- is that the thrust of one and
16 three together?

17 MR. LANIER: Yes, Your Honor. That is the
18 thrust.

19 THE COURT: Okay. All right. Well, I
13:10:29 20 think that's very clear, and I appreciate that summary.

21 Okay. I guess we'll start with the
22 manufacturers.

23 MR. HEARD: Your Honor, actually the
24 distributors will go next.

13:10:44 25 THE COURT: Okay. Distributors,

1 distributors can be next.

2 Very good.

3 MR. HEARD: Your Honor, Lane Heard. I'm
4 speaking for the distributors this afternoon, and we'll
13:10:57 5 try to provide a succinct roadmap to three dispositive
6 motions and three *Daubert* motions.

7 And Your Honor has a hard copy of the
8 slides that we submitted yesterday electronically.

9 The three dispositive motions, the first,
13:11:16 10 and not to your surprise, statute of limitations; the
11 second, civil conspiracy; and the third, proximate
12 causation.

13 The first two of these, statute of
14 limitations and civil conspiracy, were filed last week on
13:11:31 15 June the 18th. The third, causation, will be filed by
16 the end of the day today. And the sequence we would
17 suggest to Your Honor is in that very order.

18 If I may, as to each of these motions, let
19 me just highlight what it is that may be distinctive or a
13:11:56 20 wrinkle about these.

21 Where the statute of limitations is
22 concerned, this is a motion on behalf of the
23 manufacturers and the distributors together. The
24 pharmacies, as you will hear, have a separate motion
13:12:10 25 based on the statute of limitations.

1 It's a motion as to all counts in the
2 complaint, but it is styled a partial summary judgment
3 because this does not seek the complete dismissal of any
4 count. It seeks a dismissal of each claim insofar as the
13:12:31 5 claim accrued before October, 2012. And it does not
6 challenge conduct that accrued after October, 2012.

7 Now, Your Honor, you're going to find in
8 the motion as it was written that there's a slight
9 difference as between the manufacturers and the
13:12:53 10 distributors because a fraud count was asserted up until
11 today, and so the accrual rules are slightly different
12 for the fraud count, which applied only to the
13 manufacturers.

14 With the fraud count being dropped, there's
13:13:09 15 now a one hundred percent overlap in the arguments for
16 the distributors and the manufacturers as to the accrual
17 of these claims.

18 And I guess the only word of explanation is
19 this obviously is not a motion that turns on missing the
13:13:27 20 statute by days or weeks or even months.

21 The fundamental argument is that the claims
22 accrued years before these lawsuits were filed in 2017,
23 so the shorthand that's used in the motion, this breaking
24 point of October, 2012, arises from the fact that the
13:13:49 25 longest statute of limitations is five years under Ohio

1 RICO.

2 And if you count back five years from the
3 first filed complaint, which was the Cuyahoga complaint,
4 October 27th, 2017, you get to this October, 2012.

13:14:08 5 So that's, for discussion purposes in the
6 motion, the date that we keep talking about before and
7 after.

8 And that motion would obviously streamline
9 the trial because it would focus on a much more limited
13:14:24 10 period of time, the period fundamentally after October,
11 2012.

12 The second dispositive motion that's quite
13 important to the distributors is the civil conspiracy.
14 This is a motion filed just by the distributors. It's
13:14:38 15 just as to the civil conspiracy count, which is Count 11
16 in both the Cuyahoga and Summit complaints.

17 It addresses the specific elements of the
18 conspiracy alleged in each complaint. There were three
19 such elements: A conspiracy to try to jack up the
13:15:00 20 production quotas, a conspiracy to market the nine
21 misrepresentations that are set forth in the complaints,
22 and an agreement not to report suspicious orders. This
23 motion addresses the lack of evidence as to each of those
24 three alleged agreements.

13:15:16 25 This is a no-evidence motion. We waited

1 for discovery. This motion will make the argument that
2 there's no evidence to support those claims.

3 And so granting this motion obviously would
4 eliminate one count, but more particularly it would give
13:15:33 5 us a trial in which the evidence is distinct as between
6 the distributors, the manufacturers, the pharmacies.

7 The third motion on causation which will be
8 filed today is a motion filed on behalf of the
9 distributors. I think you're also going to receive such
13:15:54 10 motions separately from the manufacturers and the
11 pharmacies.

12 This, too, is a no-evidence motion. We've
13 waited to see the accumulated discovery, but you'll see
14 on the slide, Your Honor, that there's a slight break
13:16:10 15 between the first bullet point and the other three bullet
16 points, and that reflects a difference in character
17 between two sets of arguments.

18 The first bullet points to an argument that
19 Your Honor -- has not been presented to Your Honor before
13:16:30 20 on causation, and points to a particular gap in the
21 evidence that we could not have known about until
22 plaintiffs identified their experts and all discovery was
23 complete.

24 And that first bullet point goes just to a
13:16:46 25 missing component in the proof of causation. The

1 plaintiffs have obviously come forward with experts that
2 say the distributors had inadequate compliance systems.
3 What we don't have is any proof, expert or otherwise,
4 that had we done the compliance plaintiffs said we should
13:17:06 5 have done, that it would have resulted in any fewer
6 shipments of opioids into the two counties.

7 So that first bullet point, there is a
8 combination of no evidence, no expert proof that even
9 addresses that component, coupled with, you will see in
13:17:24 10 the brief, rather substantial evidence from the
11 plaintiffs' own experts that would indicate that the
12 volume of orders shipped would not have changed even with
13 adequate due diligence.

14 The second three points are addressed in
13:17:43 15 argument Your Honor has encountered in the motions to
16 dismiss; that is, the chain of causation, but now we're
17 able to couple that argument with the actual evidence or
18 lack of evidence in discovery to show why that chain is
19 too attenuated and causes too remote. And this
13:18:02 20 obviously, this motion, if granted, is dispositive and it
21 applies to all claims.

22 Where the *Daubert* motions are concerned,
23 Your Honor, there are going to be quite a number filed by
24 the defendants collectively, but I would point Your Honor
13:18:18 25 to three that are of particular concern to the

1 distributors and that concern them uniquely.

2 The three experts are James Rafalski, Seth
3 Whitelaw and Craig McCann. The first two are compliance
4 experts, and they address compliance in slightly
13:18:40 5 different ways.

6 And I want to point Your Honor to arguments
7 about each of them that are singular that you will meet
8 where they are concerned but will not meet with any other
9 experts who are being challenged. And then I want to
13:18:55 10 direct Your Honor to the ways in which Mr. Rafalski and
11 Mr. McCann are tied together. They are sort of
12 co-dependent or twin experts.

13 So where Mr. Rafalski is concerned, he
14 worked at the DEA. There are challenges to the
13:19:13 15 reliability of his opinion based on the bases, but what
16 is unique about this particular *Daubert* motion is that
17 Mr. Rafalski felt he could not disclose certain bases for
18 his opinion.

19 They involve legal guidance he had gotten
13:19:32 20 while he was an employee of the DEA. He said, rightly or
21 wrongly, that he could not disclose that.

22 So while that failure to completely
23 disclose the bases for his opinions could be construed
24 exclusively as a *Daubert* question, it's also a question
13:19:48 25 of violating Rule 26.

1 So the threshold argument Your Honor will
2 see in that motion is a Rule 26 argument that says he
3 must be disqualified because of his failure to disclose
4 fully the bases for opinion.

13:20:02 5 Let me --

6 THE COURT: What did he -- what did he say?
7 I mean, did he -- did he assert law enforcement privilege
8 or, I mean, he couldn't have just refused to answer the
9 question.

13:20:18 10 MR. HEARD: Well, I believe he felt like he
11 was constrained in part by the *Touhy* authorization that
12 he had to testify at all.

13 Also, the advice he had gotten was from
14 lawyers at the DEA. It was legal guidance which informed
13:20:32 15 his view about what the compliance regimen should be for
16 reporting suspicious orders.

17 So whichever it is, he said, "I can't
18 answer those questions."

19 And so we think there's a Rule 26 problem,
13:20:47 20 although it has a *Daubert* aspect to it as well.

21 Now, let me come back to Mr. Rafalski when
22 we talk about Mr. McCann, explain how they are twinned,
23 but let me also take Seth Whitelaw because he's the other
24 compliance expert.

13:21:06 25 What is distinctive about the *Daubert*

1 challenge here is that while there are arguments made
2 about the reliability of his opinion, which you'll see in
3 the body of the motion, this is, I think, the only
4 *Daubert* challenge to the qualifications of the expert.

13:21:25 5 It's a claim he simply doesn't have the
6 expert he would need --

7 THE COURT: That's Mr. Whitelaw?

8 MR. HEARD: That's Mr. Whitelaw.

9 THE COURT: Okay.

13:21:33 10 MR. HEARD: Now, I should say as to
11 Mr. Rafalski and Mr. Whitelaw, their opinions are
12 directed at each of the distributors and also to CVS and
13 Walgreen's, so these motions are on behalf of those
14 particular defendants.

13:21:47 15 Now, the way in which Mr. Rafalski and
16 Mr. McCann are related -- and the Court will want to be
17 reading them in conjunction, although the motions
18 certainly cross-reference one another -- is that
19 Mr. Rafalski identified five methodologies for how you
13:22:11 20 could flag suspicious orders. And through counsel,
21 Mr. McCann was provided with those five methodologies.

22 Mr. McCann is admittedly not a subject
23 matter expert. He doesn't claim any expertise with
24 regard to the DEA or suspicious orders or compliance. He
13:22:35 25 describes himself as a computer, and he did calculations.

1 So Mr. McCann's opinion in one respect sits
2 on top of Mr. Rafalski because Mr. Rafalski provided him
3 the assumptions that he used in order to count the number
4 of suspicious orders that would follow if you used
13:22:56 5 methodology one, two, three, four or five.

6 So part of our challenge to Mr. McCann is
7 those methodologies, we say, are unreliable and
8 unsupported, and if Your Honor were to find that,
9 Mr. McCann's opinion would necessarily fall.

13:23:11 10 But that relationship also operates in the
11 opposite direction as well, because after Mr. McCann had
12 done his calculations and said, "These are the number of
13 suspicious orders that you get if you do the calculation
14 using methodology one, two, three, four or five,"
13:23:32 15 Mr. Rafalski then takes that number and says, "That's the
16 number of suspicious orders that were then diverted into
17 the two counties."

18 We make arguments as to how Mr. McCann's
19 calculations are unreliable and how they did not follow
13:23:54 20 the methodology as Mr. Rafalski set it forth.

21 And so we say not only does Mr. McCann's
22 opinion fall because of faulty assumptions he received
23 from Mr. Rafalski, in the opposite direction we say
24 Mr. McCann engaged in unreliable methodologies, and that
13:24:17 25 when Mr. Rafalski took the end product, his opinion is,

1 therefore, faulty and he then failed to take an
2 additional step that would have been necessary to reach
3 his ultimate conclusion.

4 So Rafalski and McCann are intertwined,
13:24:32 5 interrelated in that way.

6 So those are the three *Daubert* motions,
7 Rafalski, Whitelaw, and McCann, that peculiarly concern
8 the distributors, but I would say in closing, Your Honor,
9 you're going to hear from my colleagues at the pharmacies
13:24:51 10 and the manufacturers, there are a series of other
11 motions that are joint so they concern us as well.

12 And of that number, I would just highlight
13 that of concern to the distributors is Mr. David Cutler,
14 who renders an opinion as to the percentage of
13:25:13 15 opioid-related harms that were caused by distributors'
16 conduct as well as manufacturers' conduct; and then there
17 is Thomas McGuire who is a damages expert.

18 Now, the damages expert, there are
19 challenges on behalf of all defendants. Mr. McGuire, I
13:25:31 20 think, will be of particular interest to the Court
21 because you'll see that the challenge is based on the
22 fact that his argument is not that there are damages, but
23 that there are opportunity costs.

24 I think that's where I would leave it, Your
13:25:47 25 Honor, except to say there are tranche two motions and

1 just so there are no surprises we expect on behalf of the
2 distributors to file a tranche two summary judgment
3 motion about negligence per se. Makes much the same
4 argument that Your Honor granted as in the tribal cases
13:26:09 5 in the last week.

6 And there will be a motion under RICO about
7 the enterprise element that in some sense is a companion
8 to the civil conspiracy claim.

9 But we would invite Your Honor to consider
13:26:26 10 the three dispositive motions we've highlighted and the
11 three *Daubert* motions.

12 Thank you.

13 THE COURT: All right. Thank you,
14 Mr. Heard.

13:26:40 15 MR. STOFFELMAYR: All right. Good
16 afternoon, Your Honor. Kaspar Stoffelmayr, and I'm
17 liaison counsel for the chain pharmacy defendants.

18 We do have our slides on the screen, but I
19 have hard copies for anyone who doesn't have one or who
13:27:10 20 needs one.

21 Your Honor, do you have a hard copy of our
22 presentation?

23 THE COURT: Yes. Thank you,
24 Mr. Stoffelmayr.

13:27:33 25 MR. STOFFELMAYR: So what I'd like to do is

1 just spend a couple minutes -- I'll try to be brief and
2 obviously nonargumentative -- just going through what are
3 the key motions from our perspective, the pharmacy
4 defendants, and how do they relate to arguments being
13:27:49 5 made by other defendants.

6 There are some related motions that will be
7 filed by other parties. I want to just highlight how
8 they're different from our motions so that's clear to the
9 Court.

13:28:01 10 You've also asked us, I think a number of
11 times, which motions are most important to us, and which
12 ones would we prefer you to focus on, at least initially.

13 It's worth pointing out there are six
14 pharmacy defendants. We are not all identically
13:28:18 15 situated. And that means you couldn't say here is the
16 one and only one motion that matters the most to all six
17 of us, but I think I can say that for all of us the most
18 important motions would be the limitations motion -- and
19 ours is different -- and the party-specific motions that
13:28:37 20 each of the six defendants will file.

21 And those actually dovetail in a way that I
22 think is helpful, and I'll get to why that is. Those are
23 not completely independent points.

24 So I'll start with our limitations motion.
13:28:53 25 This was filed on June 19th so it's already on the

1 docket, and we filed a separate motion. We didn't join
2 the motion filed by the distributors and manufacturers
3 and I want to make sure it's clear why. The underlying
4 law is the same and we don't obviously want to, you know,
13:29:12 5 replot all that ground, but the relief we're asking for
6 is quite different.

7 And the reason the relief the pharmacies
8 are asking for is so different is because there are
9 different applicable limitations periods and different
13:29:27 10 facts that are unique to us that don't apply to other
11 defendants.

12 So, first, the different limitations
13 periods, there's two reasons for that. One is different
14 claims are asserted against the pharmacy defendants. Not
13:29:41 15 all of the same claims are asserted against the pharmacy
16 defendants that are asserted against the distributors.
17 So we're only talking about an, at most, you know, two to
18 four years. You know, that's an issue to brief, but
19 we're talking about a shorter time period.

13:29:56 20 And the other reason is that the claims
21 against us were filed later. They came with an amended
22 complaint, so the relevant period with respect to us, is
23 what our motion says anyway, is looking at April, 2014
24 and forward; not 2012. And in the case of HBC and
13:30:15 25 Discount Drug Mart, it's actually even a bit later.

1 The second reason the relief we ask for is
2 so different is that all of the pharmacy defendants
3 stopped distributing controlled substances. This is not
4 an ongoing activity as plaintiffs would say it is, you
13:30:32 5 know, with respect to the distributors.

6 The pharmacies all stopped doing
7 distribution, but they stopped it at different points in
8 time. It's not as if there was one cut-off date that
9 applies to everybody. So for that reason, the exact
13:30:48 10 relief we ask for is going to vary with respect to each
11 pharmacy.

12 In some cases, we say distribution stopped
13 entirely outside of the limitations period, and we ask
14 for summary judgment in its -- you know, on those claims
13:31:03 15 in their entirety.

16 In other cases, we say that there was some
17 distribution in a brief period inside the limitations
18 period. It might be a period of only a few months, so we
19 say that as to that entity, the limitations argument
13:31:21 20 doesn't dispose of the claim entirely. But it does limit
21 the claim to a very, very brief period.

22 And that's how the party-specific motions
23 dovetail with the limitations motion. The limitations
24 motion, you know, tells you what's left to look at, what
13:31:35 25 is the relevant period you need to look at, and then the

1 party-specific motion might say -- and this will vary
2 party-by-party -- "In that brief period that's still
3 relevant no one has criticized our conduct. They've
4 criticized our conduct for things that happened in
13:31:50 5 earlier time periods, but not in that window that's still
6 relevant.

7 THE COURT: All right. Could you
8 just -- do you have those dates --

9 MR. STOFFELMAYR: I can certainly provide
13:31:57 10 them.

11 THE COURT: -- for the different
12 pharmacies?

13 I've read that. I've read the motion.

14 Was this triggered by when these drugs were
13:32:19 15 changed in classification from Schedule III to Schedule
16 II?

17 I know that promised a lot of companies to
18 change their business plans.

19 MR. STOFFELMAYR: Again it's not
13:32:28 20 consistent.

21 There's certainly some of the pharmacy
22 defendants that only ever distributed C-III or
23 Category -- Schedule III controlled substances and so
24 when hydrocodone was rescheduled from Schedule III to
13:32:42 25 Schedule II, that's when they stopped distributing the

1 last opioid.

2 So the relevant dates would be in the case
3 of Walgreen's, their last distribution into Ohio was
4 April of 2014. Early April. So that's outside the
13:32:59 5 limitations period.

6 There are two different relevant CVS
7 entities. One of them also last shipped a
8 hydro -- excuse me -- Hydrocodone combination product in
9 April of 2014 outside of the limitations period. The
13:33:17 10 other CVS entity shipped Hydrocodone-containing products
11 until later in the year, April or September, 2014.

12 So that would be a case where there's just
13 a sliver of months inside the limitations period.

14 Giant Eagle, HBC, is in a similar
13:33:36 15 situation. It was with the rescheduling of Hydrocodone
16 that their distribution ended.

17 I believe the same is true for Rite Aid.
18 Their last shipments were in September of 2014.

19 And then Discount --

13:33:49 20 THE COURT: Giant Eagle was September of
21 2014?

22 MR. STOFFELMAYR: Yes, Giant Eagle was also
23 September of 2014.

24 THE COURT: Okay.

13:33:57 25 MR. STOFFELMAYR: Same with Rite Aid and

1 same with Discount Drug Mart. Each of them -- sorry, in
2 the case of Discount Drug Mart, it's -- well, each of
3 them stopped distributing when Hydrocodone was
4 rescheduled from Schedule III to Schedule II.

13:34:15 5 THE COURT: So that's September, 2014.

6 MR. STOFFELMAYR: October, 2014.

7 Many of them had a last shipment in
8 September in advance of when the rescheduling became
9 effective in October.

13:34:26 10 THE COURT: All right.

11 And what about Walmart, did you mention
12 them?

13 MR. STOFFELMAYR: Walmart goes later.

14 Walmart shipments continued until April of
13:34:38 15 2018, so for them it's not -- again it's not continuing,
16 but the conduct of distribution anyway continues for
17 several years.

18 It's not just a matter of months in that
19 case.

13:34:54 20 So then I think each of those entities that
21 has at least a sliver of distribution inside the
22 limitations period or more than a sliver is going to
23 argue in their defendant-specific motion -- and this is
24 an argument they can only make individually about
13:35:09 25 themselves -- "Hey, nobody criticized our conduct in that

1 time period. They might have criticized us for things we
2 did earlier, but in that time period, not."

3 THE COURT: Well, they're only sued as
4 distributors in these -- in this case.

13:35:25 5 MR. STOFFELMAYR: In this case that's
6 correct. These are all arguments that relate
7 specifically to the Track 1 trial.

8 THE COURT: All right.

9 MR. STOFFELMAYR: These don't necessarily
13:35:31 10 have broader consequences.

11 There are arguments about the limitations
12 period under Ohio law in this particular -- in this
13 particular trial, but the effect they would have if the
14 motions were granted would be to remove this group of
13:35:46 15 defendants from the Track 1 trial; not from
16 the -- wouldn't have necessarily broad consequences
17 beyond that in the litigation.

18 Obviously we might or might not have
19 limitations arguments that relate to other trials or
13:35:58 20 other cases.

21 The other sort of overreaching motions we
22 have filed are -- or will file will be a causation
23 motion. The arguments will be similar as far as the law
24 goes, but specific to our facts.

13:36:23 25 And this will be a no-evidence motion as it

1 was described, simply no evidence connecting the
2 shipments, the pharmacy distributors -- sorry -- pharmacy
3 defendants acting as distributors to their own stores.
4 No evidence that would connect those shipments, we would
13:36:42 5 say, to the harm that plaintiffs are claiming.

6 And the harm we're talking about here that
7 this motion will be focused on is harm that is allegedly
8 connected to diversion.

9 You know, when it comes to the pharmacy
13:36:56 10 defendants, like the other distributors, the claim here
11 isn't that we shipped too much to our own stores in order
12 to fill legitimate prescriptions, even if there is a
13 claim that those legitimate prescriptions were a result
14 of improper demand. The claim is that the shipments to
13:37:15 15 our stores are somehow connected to the diversion of
16 opioids, the improper diversion; not the filling of
17 legitimate prescriptions.

18 THE COURT: I mean, they would have to show
19 that one or more of the stores of the specific pharmacy
13:37:27 20 defendant was a pill mill.

21 MR. STOFFELMAYR: Essentially, yes.

22 And there is -- our motion will argue that
23 there is no evidence that would allow a trier of fact to
24 draw that conclusion.

13:37:38 25 THE COURT: Okay.

1 MR. STOFFELMAYR: We also have a conspiracy
2 motion. This was filed on June 21st, and I just to want
3 make sure it's clear to the Court how this is different
4 from the RICO arguments the Court has already seen in the
13:37:50 5 motion to dismiss context, and will probably see again in
6 the summary judgment context.

7 There is no RICO claim pled against the
8 pharmacy defendants, so this motion goes only to the Ohio
9 common law conspiracy claim. And it's a no-evidence
13:38:08 10 motion. We say there is no evidence to allow a trier of
11 fact to conclude that the pharmacy defendants entered
12 into a, quote, unquote, malicious combination, which
13 would be required for a civil conspiracy claim.

14 The third and last common motion, which has
13:38:25 15 not been filed yet but will, is a preemption motion, and
16 this is a preemption argument the Court has not seen yet.
17 I do want to, at the outset, again make clear what it's
18 not.

19 This is not the sort of preemption argument
13:38:38 20 the Court has seen made by the manufacturer defendants
21 that has to do with how the FDA regulates the labeling
22 for prescription drugs. That's an important preemption
23 argument, but a very different one.

24 Our preemption argument goes to how the
13:38:54 25 legal scheme governing the distribution of controlled

1 substances works. And the issue presented is whether the
2 balance that this Controlled Substances Act strikes
3 between permitting distribution and restricting
4 distribution, I mean one way to think of it is the
13:39:14 5 statute is clear on this, it has two goals, to get drugs
6 into the hands of people -- I'm paraphrasing obviously --
7 but to get drugs into the hands of people who need them
8 and to keep drugs out of the hands of people who
9 shouldn't have them.

13:39:26 10 That's a balance that the statute tries to
11 strike by making some things legal and some things
12 illegal, and the issue presented is whether it's
13 permissible under preemption law for state tort law
14 obligations to rest on top of that federal scheme and
13:39:42 15 alter the balance. And our argument obviously is that
16 it's not permissible.

17 And then, finally, on the summary judgment
18 motions I alluded to, each pharmacy defendant will file
19 an individual motion. They will be -- you know, they are
13:39:57 20 certainly not complete. They will be variations of
21 no-evidence motions and, as I said, in many cases they
22 will dovetail with the limitations motion.

23 Last point I want to address, and don't
24 want to spend unnecessary time on it, are the *Daubert* or
13:40:13 25 expert motions. I would only just reiterate what

1 Mr. Heard said from our perspective as well the Rafalski,
2 McCann and Whitelaw motions are the ones of the greatest
3 unique concern to us.

4 And I completely agree as to Rafalski and
13:40:33 5 McCann, it's not a qualifications challenge, it is a
6 challenge to assumptions that they both make, and it's a
7 consequence of the way their reports work together or
8 their opinions work together that if one falls, the other
9 falls as well.

13:40:49 10 So if Rafalski is inadmissible,
11 Mr. McCann's opinions don't come in and, likewise, if
12 Mr. McCann's opinions are improper, there would be no
13 basis for at least most of, I don't want to say
14 everything, but much of what Mr. Rafalski says. That's
13:41:05 15 our argument in any event.

16 The other motions, we list the ones on our
17 slide which you would say we have a particular interest,
18 but again those three, if you were asking us to
19 prioritize, those three are certainly the most important
13:41:21 20 from our perspective. Followed by, I think, by the
21 Cutler and Gruber motions where the experts try to say as
22 a matter of economics, "Here's how I connect a volume of
23 shipments to damages actually suffered by the
24 plaintiffs."

13:41:36 25 You know, it's one thing to say, "Here's a

1 lot of shipments and here's a lot of expenses," but how
2 do you say what would have been different, you know, the
3 but-for world if those shipments had not happened or had
4 been smaller, would expenditures have been any different.

13:41:55

5 And the Cutler and Gruber opinions go to
6 that, and so our motions on those experts are obviously
7 important to us as well.

8 THE COURT: Okay. Thank you very much,
9 Mr. Stoffelmayr.

13:42:13

10 MR. CHEFFO: Thank you, Your Honor. Mark
11 Cheffo.

12 Do you have a copy of our slides?

13 THE COURT: Yes, I have them, Mr. Cheffo.

13:42:36

14 You have more slides, you have the most
15 number of slides.

16 MR. CHEFFO: That's what it looks like.

17 Yeah, I think we win the prize for the most slides.

13:42:53

18 Your Honor, so let me first just thank you
19 and Magistrate Judge Ruiz and the Special Masters and the
20 clerk -- your clerks and your staff for giving us this
21 opportunity -- we really do appreciate -- to really
22 preview and contextualize what you're going to be seeing
23 on Friday, some of which you've seen already and I think
24 anticipate.

13:43:04

25 The way we're going to do it, if you don't

1 mind, we're going to stay seated because I'm going to do
2 part of this and Donna Welch and Steve Reed, we're going
3 to somewhat tag team here.

4 What we, I think, want to do is just set
13:43:17 5 the backdrop here.

6 So you've made some comments about the
7 number of motions, and we are very sensitive to that
8 fact, but I think to some extent the next slide or two
9 just really tells the story here.

13:43:26 10 And we hear Mr. Lanier's comments and they
11 dropped the fraud claim and he indicates that he's going
12 to continue to trim, and obviously to the extent that
13 some of these 80 different defendants and some of these
14 multiple causes of actions are trimmed, that will be
13:43:39 15 helpful to us. It will be helpful to the Court and
16 obviously the staff. So we welcome that kind of
17 expeditiously.

18 But the point being that there are, as you
19 can see, many different causes of action. Some of them,
13:43:53 20 as you can see here, are against all the defendants, but
21 then there's a host of other RICO and Ohio claims that
22 are as to certain defendants but still a substantial
23 portion.

24 Some of them are overlapping. Some of them
13:44:07 25 are not. But obviously they are all going to require an

1 incredible amount of proof and experts, and to the extent
2 that we can trim those, obviously that will -- that will
3 help everyone.

4 What I'm going to, with my colleagues'
13:44:22 5 help, try to do today is identify those motions and
6 *Daubert* challenges that we think should be read together
7 respectfully, hopefully give the Court a little bit of
8 guidance at least as to our thinking, how we would
9 approach it.

13:44:37 10 What you'll also hear is that certain of
11 the *Daubert* motions and others might not be needed and
12 probably would not be needed if you were to grant some in
13 whole or in part. Some dispose of all claims, others
14 just certain of the claims, and then there's, frankly, a
13:44:50 15 grouping of particularly *Daubert* motions and perhaps even
16 some of the summary judgment issues that would
17 substantially streamline the evidence and the time
18 required at trial, which we think is also a very
19 important objective.

13:45:01 20 And the last thing I think I'll say as a
21 preview is that, you know, we don't really prioritize
22 these in terms of order of importance because, frankly,
23 you know, we think that they're all important. But what
24 we've tried to do is, again, give the Court some type of
13:45:17 25 visibility as to how it might consider approaching these

1 motions.

2 So this is kind of an overall slide. As
3 you can see on the left, there's the statute of
4 limitations issue, then there's the causation motions.

13:45:29 5 And we would suggest, you know, obviously to the extent
6 even if you were to divide *Daubert* with causation, as
7 you'll hear from Ms. Welch, that this is one that we
8 think are, to a large extent, inextricably intertwined.

9 And it would make sense to read both the *Daubert* along
13:45:45 10 with the causation briefs because, as you'll hear, we
11 think that really they are a predicate for one another.

12 Obviously then there will be the RICO
13 summary judgment motions, and then there are the joint
14 summary motions that are listed here, including
13:46:00 15 preemption, public nuisance, and then Steve will talk
16 about -- Mr. Reed will talk about the generics and no
17 evidence issues.

18 This again, you know, in the spirit of
19 roadmap, the marketing *Dauberts*, Dr. Egilman, Dr. Kessler
13:46:17 20 and Perri, those are folks who we've made *Daubert*
21 challenges to.

22 We've combined, as you'll see, the
23 Kessler/Perri motions.

24 There's the diversion *Dauberts*. You've
13:46:28 25 heard a little bit about those, and those are the three

1 experts that we intend to challenge.

2 There's the damages experts, McGuire, and
3 the abatement, and then obviously there's the other
4 separate *Daubert* challenges that you will see and you
13:46:45 5 will receive on Friday.

6 So with that, I will be back in a minute or
7 two, but I'm going to ask Ms. Welch to kind of address
8 the causation issues.

9 MS. WELCH: Good afternoon, Your Honor, and
13:47:00 10 Special Masters and staff.

11 I would like to provide a brief framework
12 for the manufacturer defendants' specific briefing
13 relating to plaintiffs' burden to prove proximate cause
14 which we believe cuts across all claims.

13:47:15 15 And the principal brief that we would point
16 the Court to is, in the first instance, the manufacturing
17 defendants' summary judgment motion which will be filed
18 on Friday regarding a failure to prove proximate cause.

19 And as a threshold issue, we would note for
13:47:37 20 the Court that plaintiffs' sole proof of proximate cause
21 with respect to the manufacturing defendants relies on
22 interrelated aggregate proof models of their experts.

23 And with respect to the manufacturing
24 defendants' marketing-based claims, the claims that
13:48:01 25 essentially allege that misrepresentations made by the

1 manufacturers in the promotion and marketing of
2 prescription opioids caused the harm, relies solely on
3 two aggregate proof models: One offered by Professor
4 Meredith Rosenthal and one by Professor David Cutler.

13:48:24 5 We would respectfully suggest that the
6 Court may want to first review the manufacturing
7 defendants' causation motion, and then the related
8 *Daubert* motions directed at Professor Rosenthal and
9 separately at Professor Cutler.

13:48:45 10 And the principal basis of the summary
11 judgment motion, which comes out in the *Daubert* motions
12 as well, is that these models simply don't separate out
13 harm, on the one hand, from prescription opioids and
14 harm, on the other hand, from illegal drugs.

13:49:13 15 Second, that neither of the models separate
16 out in any way lawful marketing by the manufacturers from
17 marketing that is alleged to be unlawful.

18 MR. WEINBERGER: Your Honor, Peter
19 Weinberger.

13:49:33 20 We followed your directive, and I don't
21 believe Ms. Welch is following the directive that we're
22 not going to argue these motions today.

23 And this seems --

24 THE COURT: Well, I don't -- I mean, she
13:49:47 25 just said, "This is what our motion's going to say," all

1 right.

2 I mean, I think she's explaining how the
3 proximate cause model motion relates to the *Daubert*
4 challenges for Rosenthal and Cutler, so that's how I took
13:50:02 5 it.

6 I mean, so the -- the attack basically
7 is -- what she's saying is -- and, Peter, I don't know if
8 it's true -- she's saying that your -- your proof relies
9 almost exclusively on these two experts, and if they
13:50:19 10 knock out these experts, then they knock out your proof.

11 And she's just said this is what they're
12 saying so, I mean, so far I don't think it's a problem.
13 I don't want -- need any more argument, but just saying
14 what the challenge is so.

13:50:36 15 MS. WELCH: Thank you, Your Honor. And
16 that was certainly the intent this afternoon, just to
17 isolate and help the Court understand the bases for the
18 causation motion and the overlap with the bases in many
19 respects for the separate *Daubert* motions.

13:50:51 20 The third point with respect to the models
21 that we would point out is that they don't separate out
22 the conduct of any individual defendant manufacturer
23 versus nondefendants or all manufacturers together.

24 The impact with respect to granting the
13:51:14 25 causation motion for the manufacturing defendants would

1 be resolution of all of the claims against the
2 manufacturing defendants brought by the Track 1
3 plaintiffs, and we believe would provide meaningful
4 guidance regarding the proof that needs to be offered by
13:51:30 5 other MDL plaintiffs, including in Track 2.

6 And if you turn to the next slide, this
7 attempts visually to identify again the aggregate proof
8 models that are relied on here, first for the bucket of
9 marketing-related claims against the manufacturers, and,
13:51:54 10 second, for the distribution or diversion-related claims.

11 And I'll talk briefly about the motion
12 being brought with respect to Professor Rosenthal's model
13 and with respect to Professor Cutler's model.

14 I believe the Court has now heard a little
13:52:17 15 bit about the McGuire damages *Daubert* motion which is
16 being brought on behalf of all the defendants, but
17 suffice it to say -- and I think, Your Honor, you've got
18 it exactly right -- that it is our position that if the
19 causation motion for the manufacturers were to be
13:52:32 20 granted, it would obviate the need to address the
21 Rosenthal motion or the Cutler motion as it relates to
22 the manufacturers.

23 On the flip side --

24 THE COURT: It was actually the opposite.

13:52:46 25 So you're saying that the -- you're saying

1 that the only -- the only evidence that the plaintiffs
2 have on proximate cause comes from these two experts and
3 if I knock out these experts, they don't survive *Daubert*
4 challenge, then there isn't anything there.

13:53:05 5 So you're suggesting they are interrelated;
6 not that they are somehow some separate -- that's how I
7 took it.

8 MS. WELCH: You're exactly right, Your
9 Honor. It's really two sides of the same coin in our
13:53:20 10 view.

11 If the Rosenthal and Cutler models were to
12 be admitted into evidence, we believe -- and we don't
13 believe they should be -- but we believe that the same
14 result applies because even taking those models at face
13:53:37 15 value, they simply don't connect the proximate cause
16 dots.

17 So whether it's grant of the causation
18 motion for summary judgment leading to no need to further
19 separately address the two *Daubert* motions, or
13:53:53 20 addressing, first, the Rosenthal motion and next in line
21 the Cutler motion, we believe if those two models were
22 excluded, then the claims against the manufacturing
23 defendants would fail.

24 Briefly, with respect to the separate
13:54:13 25 bucket of theories against the manufacturing defendants,

1 which is the distribution or the diversion claims, again
2 we think there is an interrelated component with respect
3 to the aggregate proof, which is the only proof
4 plaintiffs offer of causation for the diversion or
13:54:33 5 distribution claims.

6 I won't go into the bases for the motions
7 to exclude McCann and Rafalski. They were addressed both
8 by Mr. Heard and Mr. Stoffelmayr.

9 Suffice it to say that from the
13:54:53 10 manufacturers' perspective, none of the experts --
11 McCann, Rafalski, or Lacey Keller -- identify any
12 suspicious orders that were shipped by manufacturers into
13 the Track 1 counties.

14 So as a threshold matter, we believe
13:55:14 15 proximate cause, the story of proximate cause begins and
16 ends on the diversion claims with the exclusion of
17 McCann, Rafalski and Keller.

18 I would note further -- and it's the red
19 zeroes on this chart -- that you will see in our
13:55:36 20 causation summary judgment motion that plaintiffs offer
21 no proof, expert or otherwise, that purports to link any
22 alleged diversion by manufacturers to either third party
23 harms or further down the chain to damages or abatement.

24 So we believe there is a failure of
13:56:01 25 proximate cause both with respect to the marketing claims

1 and the distribution claims.

2 Specific with respect to the marketing
3 claims, again after a review of the manufacturers'
4 causation motion, we would respectfully suggest that the
13:56:26 5 Court would want to review the *Daubert* motion regarding
6 Professor Rosenthal's aggregate proof model.

7 We don't seek to exclude Professor
8 Rosenthal on the basis of qualifications, but as the
9 Court knows, expert opinions that don't fail -- or that
13:56:46 10 don't connect the alleged conduct of a defendant to
11 injury are commonly excluded for lack of fit.

12 And lack of fit is the principal basis for
13 the *Daubert* motion regarding Professor Rosenthal.

14 Rosenthal assumes that all marketing was
13:57:09 15 unlawful.

16 MR. WEINBERGER: Objection, Your Honor.

17 THE COURT: Well, yeah, that, that's more
18 of an argument, so I agree.

19 So you're just saying her expert -- her
13:57:21 20 expert opinion doesn't fit the issues in this case.

21 MS. WELCH: That's exactly right, Your
22 Honor.

23 And beyond that, as identified in the
24 briefing, we believe there are other methodologic flaws
13:57:34 25 that would separately require exclusion of Professor

1 Rosenthal.

2 Next, we would urge the Court to look at
3 the *Daubert* motion as it relates to Professor David
4 Cutler. Because Professor Cutler relies, as one of his
13:57:58 5 principal inputs in his model, on Professor Rosenthal,
6 it's our belief that if the Rosenthal model is excluded,
7 the Cutler model fails as well.

8 So again, with respect to the claims
9 against the manufacturers, if the Rosenthal *Daubert*
13:58:19 10 motion is granted, it would obviate separate
11 consideration of the Cutler *Daubert* motion with respect
12 to manufacturers.

13 But I would note that the Cutler *Daubert*
14 motion is brought on behalf of all defendants, and so in
13:58:36 15 addition to inappropriate reliance on the Rosenthal
16 inputs, we have separate fit issues with Professor
17 Rosenthal's aggregate proof models, which really look at
18 average national opioid shipments by anyone and a
19 correlation with opioid mortality, both related to
13:59:02 20 prescription drugs and illegal drugs.

21 The final set of *Daubert* motions that we
22 would suggest the Court would want to look at -- but
23 again after the causation brief, the Rosenthal *Daubert*
24 motion and the Cutler *Daubert* motion -- would be related
13:59:24 25 *Daubert* motions that go to three noneconomic experts who

1 attempt to link the marketing of the manufacturer
2 defendants to illegal drugs. Those are David Schumacher,
3 an anesthesiologist; Anna Lembke, a psychiatrist; and
4 Katherine Keyes, an epidemiologist.

13:59:52 5 These would not be dispositive with respect
6 to the causation motion for summary judgment, but they do
7 inform that motion in certain respects.

8 And the principal basis on which we move to
9 exclude all three of those experts are qualifications and
14:00:10 10 the reliability of their underlying methodologies,
11 including a failure to analyze conduct specifically in
12 the Track 1 counties.

13 And with that, I'll turn it back over to
14 mark.

14:00:23 15 MR. CHEFFO: Great. Thanks, Donna.
16 Thanks, Your Honor.

17 So as you just heard, those were, you know,
18 essentially what we would, you know, respectfully request
19 of the place to start to the extent that the Court has to
14:00:35 20 start somewhere.

21 And what I'm going to cover now are some of
22 the, you know, again important claims, but many of them
23 may not need to be addressed to the extent that the Court
24 were to grant in part some or all of the causation
14:00:48 25 issues.

1 So with respect to the RICO and conspiracy
2 claims, this would obviously resolve less than all of the
3 claims. We believe we've tried to track some of the
4 guidance and learning from the Report & Recommendation,
14:01:02 5 Your Honor's previous rulings, and obviously to the
6 extent a RICO claim was dismissed, conspiracy claims, it
7 would substantially narrow the case and, we think, make
8 it much, much more manageable from a trial perspective by
9 a lot.

14:01:18 10 I won't spend a lot of time; just
11 highlighting what you might expect are the bases of our
12 motion which would go to the two RICO claims is
13 challenging the enterprise and conspiracy allegations,
14 and basically that there's no evidence of cause -- of
14:01:35 15 injury or damages that is caused by the RICO violations.

16 And as you can see there, it would resolve
17 six of the claims and, as I indicated, really
18 substantially narrow this case for trial.

19 With respect to nuisance, again relatively
14:01:52 20 straightforward in the sense of what our arguments are.
21 This is on behalf of the manufacturers. It is two, two
22 of the counts, the common law and statutory nuisance
23 claims.

24 You know, the three primary bases, no
14:02:07 25 evidence that manufacturers significantly interfered with

1 a public right. Implicit in that is that we don't
2 believe that the plaintiffs have actually defined what a
3 nuisance is or, you know, appropriately characterized
4 that, other than kind of claims about an opioid crisis or
14:02:26 5 epidemic, which we don't think are enough.

6 And to the extent that they are going to
7 rely on what Your Honor offered in the *Blackfeet*
8 decision, I guess that will remain to be seen, but that's
9 going to be a core element of our motion with respect to
14:02:39 10 nuisance.

11 You can also see that we don't believe that
12 the manufacturers violated any predicate law, nor is
13 there any evidence of that; and again the causation
14 argument, that there's no evidence that the conduct
14:02:52 15 proximately caused any harms in the counties at issue,
16 and obviously would substantially narrow the claims in
17 terms of the nuisance issues.

18 I'm going to briefly now turn to a few of
19 the *Daubert* motions.

14:03:08 20 So this is a motion that is brought on
21 behalf of all defendants. We believe that this is one
22 that can, you know, wait until after Your Honor addresses
23 the causation issues.

24 Our kind of main issue, as you'll read, is
14:03:23 25 that Dr. Egilman is a kind of a catch-all. He, in our

1 view, purports to do what a jury should be doing. He
2 offers opinions about the defendants' motives. He
3 basically --

4 MR. WEINBERGER: Objection, Your Honor.

14:03:37 5 MR. CHEFFO: I'm just explaining what they
6 are going to read on Friday.

7 THE COURT: All right. I think basically
8 you're saying -- you're alleging that he's taking the
9 role of a jury and it's not a proper subject for an
14:03:50 10 expert.

11 MR. CHEFFO: That's correct, Your Honor.

12 THE COURT: So I can see the slides so.

13 MR. CHEFFO: Okay. And I think that's
14 right.

14:03:57 15 And I think the one, the one point we would
16 make throughout all of these is that there are clearly
17 some of the *Daubert* motions, and I think you've heard,
18 that are focused on qualifications, but it is important I
19 think to focus that many of them are not focused on
14:04:11 20 qualifications, and there are fit and reliability issues
21 that I think are important to focus on.

22 Matthew Perri is, as I indicated, he and
23 Dr. Kessler are addressed in the same motion. Unlike
24 Dr. Kessler where our motion is focused on certain
14:04:29 25 aspects of Dr. Kessler's testimony, with respect to

1 Matthew Perri it's focused on his entire testimony, and
2 similar to what, you know, we heard and what you can read
3 is that he basically, you know, in our view does not
4 serve an appropriate role as an expert. And telling the
14:04:46 5 jury, you know, what documents say and people think and
6 what conclusions are is not appropriate.

7 Then with respect to Dr. Kessler, again,
8 all defendants have moved with respect to him, same
9 motion because it's similar -- excuse me. Thank you. I
14:05:08 10 have to keep up here.

11 He -- what we have not moved with respect
12 to, you know, regulatory framework testimony are issues
13 or more about offering legal opinions, kind of reading
14 documents and try to articulate what companies think or
14:05:25 15 why they did. We think that's a basis for exclusion, as
16 he has been excluded before on similar grounds.

17 And Lacey Keller, we seek to exclude her
18 entire testimony; reliability and fit, foundation issues.
19 I mean, just as a quick preview, the main kind of thrust
14:05:49 20 is that she only does kind of one step of what we think
21 is a two-step analysis for suspicious orders. We lay
22 that out, I think, pretty clearly in the brief.

23 And as a result, we think that her opinions
24 don't fit and there's not an appropriate foundation.

14:06:05 25 And then, finally, before I turn it over to

1 Mr. Reed, there's a preemption issue you've heard about.
2 The distributors' preemption issue.

3 Ours is, we think, well-taken for a number
4 of reasons. And also, obviously, to the extent that the
14:06:26 5 Court were to grant this in whole or part would again
6 substantially limit the amount of evidence and the
7 documents and the testimony that would be required.

8 So the main thrust is that there's a
9 preemption argument that we think is well-founded with
14:06:43 10 respect to the plaintiffs' state law claims for
11 inadequate marketing and labeling based on, you know,
12 lawful and approved products, and their state law fraud
13 on the DEA claims are also preempted.

14 And this is -- this is a particularly
14:06:57 15 important one for streamlining, you know, what we think
16 will be a very challenging, you know, trial period, to
17 the extent that the Court allows the cases to proceed.

18 So I am, in the spirit of time, unless Your
19 Honor has any questions, I'm going to turn it over to
14:07:14 20 Mr. Reed to kind of close it out.

21 THE COURT: Okay.

22 MR. REED: Thank you, Your Honor. So I
23 have the good fortune of batting cleanup.

24 A few slides that I would like to go
14:07:28 25 through.

1 I focus on some specific motions for
2 summary judgment.

3 The first one is a targeted motion for
4 summary judgment filed on behalf of -- well, filed with
14:07:38 5 respect to generics. There are two types of defendants
6 who will be joining this motion. There are defendants
7 who have only sell and have only ever sold generic
8 medications, and then there are defendants who sell both
9 branded and generics, but the motion itself will be
14:07:56 10 focused on claims with respect to generics.

11 The claims at issue in this motion will be
12 claims based on the alleged false marketing or failure to
13 warn with respect to generics.

14 So it's a fairly targeted motion. You'll
14:08:09 15 see that that targeted motion addresses a number of
16 claims in the complaint, so it will have the effect, if
17 granted, of significantly narrowing the case and the
18 issues at trial. And it will also have the effect, or
19 should, of limiting the number of defendants who will
14:08:27 20 have to participate in the trial.

21 I don't intend to get into argument, but we
22 do identify for Your Honor's convenience the bases on
23 which this group will intend to move.

24 We'll explain some differences about the
14:08:40 25 industry and why generics don't promote their products.

1 We'll explain that there was no record
2 evidence of promotion in the record.

3 We'll explain the law that was briefed in
4 the tribal cases, and I think is familiar with Your
14:08:57 5 Honor, that explains why any state law claim that would
6 impose a duty to warn is preempted by federal law.

7 And then, finally, it will address a
8 concern that Your Honor has expressed at one point or
9 another about whether there's liability when
14:09:11 10 one-third -- one entity sells into a market that it has
11 reason to believe is inflated by fraud. And we'll
12 explain how the Supreme Court and the Sixth Circuit have
13 addressed that particular issue.

14 So that, that is -- that motion, and as I
14:09:25 15 say, that could have a significant impact in narrowing
16 the case.

17 If we go to Slide 20, these are
18 defendant-specific motions, so much of what you've heard
19 to this point, Your Honor, are descriptions of motions
14:09:41 20 that are jointly filed either by all defendants or by
21 groups of defendants, but as Your Honor recognized at the
22 May hearing and I think has recognized throughout this
23 case, there are multiple defendants in this case, and
24 each of them has the right to defend itself.

14:09:59 25 We're still left with -- I don't know what

1 the final count is, but we've got many dozens of
2 defendants, and each of them has an interest in
3 addressing the claims against them.

4 So the goal here is to have short, focused
14:10:12 5 motions filed on behalf of those manufacturer defendants
6 who wish to file them. It's not clear yet whether all of
7 them will want to or not. But to the extent they do, the
8 intent here is to focus on unique factors applicable to
9 that defendant, the moving defendant, again with a goal
14:10:30 10 to avoid overlap.

11 But some of the themes that you'll see will
12 cut across motions -- absence of wrongdoing, absence of
13 causation, settlement/release, et cetera -- but again the
14 intent here will be to focus on defendant-specific
14:10:46 15 issues, the record as to those defendants.

16 And again the implications, if those
17 motions are granted, obviously it will help to cull the
18 case.

19 We've heard from Mr. Lanier that the
14:10:58 20 plaintiffs intend to cull the case, to drop defendants.
21 Certainly this is one way we can encourage the Court to
22 do that for the plaintiffs.

23 And, finally, if we go to the last slide,
24 Slide 21, these are the so-called no-evidence defendants.
14:11:18 25 Maybe we will improve upon the title when we finally get

1 to filing, but the whole point here is again we have
2 dozens of defendants in this case. Some of the
3 defendants in the Track 1 case were added -- added to
4 this case even after the close of discovery.

14:11:33 5 And for many of them, they were never
6 served with discovery. There's no evidentiary record
7 with respect to defendants.

8 We've listed a number of those entities on
9 this slide. It's not meant to be exhaustive. But again,
14:11:47 10 the point here is that to the extent there's no evidence
11 in the record with respect to these defendants, there's
12 no legitimate issue of fact that would justify having
13 them appear at trial.

14 It obviously serves the broader goal of
14:12:03 15 streamlining the case, culling the defendants, and
16 focusing on those entities, in the short period of time
17 that we have, where plaintiffs have some basis to assert
18 a claim.

19 THE COURT: Okay. Thank you, Mr. Reed.

14:12:17 20 Do you have any questions?

21 All right. Well, I want to thank all
22 counsel. There was a lot of -- obviously the ones who
23 spoke, but there were a whole lot of other folks behind
24 the scenes who helped put this together.

14:12:32 25 I think this is very helpful to me and my

1 team to get a preview. Obviously I've read the ones that
2 have been filed so I had a good sense of those, but all
3 the others and how they relate, and we'll figure out the
4 best way that we can to address them.

14:12:49 5 So unless anyone else has anything to say,
6 anything?

7 We're adjourned, and I want to thank
8 everyone.

9 THE CLERK: All rise.

14:13:00 10 (Proceedings concluded at 2:13 p.m.)

11 - - - -

12 C E R T I F I C A T E

13 I certify that the foregoing is a correct
14 transcript from the record of proceedings in the
15 above-entitled matter.

16
17
18
19 /s/Susan Trischan

20 /S/ Susan Trischan, Official Court Reporter

21 Certified Realtime Reporter

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